

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO. 45 OF 2022**

*(Arising from judgment and decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 377 of 2019)*

**MARIAM SEIF.....1<sup>ST</sup> APPELLANT**

**SALMA SEIF.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SEIF ABRAHAMANI SEIF.....RESPONDENT**

*Date of last order: 19/7/2022*

*Date of ruling: 04/8/2022*

**JUDGMENT**

**A. MSAFIRI, J.**

The appellants herein are the daughters of the respondent. The appellants jointly on one hand and the respondent on the other hand claim to own house No. KND/TND/KTB7/11 situated at Tandale Kwa Tumbo within Kinondoni Municipality (disputed house). It was alleged that both parties purchased the disputed house on 10/12/2010 at the price of Tsh 43,500,000/= . The appellants claimed that the respondent had invaded the disputed house on 01/9/2018. They therefore instituted Land Application

*Alles*

No. 377 of 2019 before the District Land and Housing Tribunal for Kinondoni District at Mwananyamala (the trial Tribunal), against the respondent claiming for reliefs *inter alia* against him that he be restricted from interfering with the disputed house.

The respondent in his written statement of defence filed on 12<sup>th</sup> September 2019, disputed the appellants' claim and stated that he is the lawful owner of the disputed house as he purchased the same from Swalehe Salimu Muhakishi on 12/10/2010.

After hearing the parties, the trial Tribunal dismissed the appellants' case and declared the respondent to have legally purchased the disputed house.

The appellants being aggrieved with the trial Tribunal's judgment and decree have lodged this appeal with four grounds of appeal namely;

1. *That the trial tribunal erred both in law and facts to decide against the appellants on ground that they did not call material witness who witnessed sale agreements for the appellants and the respondent.* *Alle*

2. *That the trial tribunal erred in law and facts to base its judgment on sale agreement by the respondent which was admitted for identification purpose only.*
3. *That the tribunal erred in law to base its decision on the evidence by DW-5 who did not understand the question put to him due to old age and illness.*
4. *That the tribunal erred in law and facts for failure to rule in favour of the appellants who had the title to the disputed land.*

The appellants therefore pray before this Court that the decision of the trial Tribunal be quashed and set aside and the appellants be declared as lawful owners of the disputed house.

On 13/6/2022 this Court ordered the appeal be disposed of by way written submissions whereby Messrs Burhan Mussa and Ndanu Emmanuel learned advocates appeared for the appellants and the respondent respectively. Both parties complied with the order hence this judgment.

Before going to the merits or otherwise of the appeal itself, I have noted that hearing of the matter during the trial was conducted with aid of two assessors as required by Section 23 (1) of the Land Disputes Courts *Act.*

Act [CAP 216 R.E 2019], (the Act) in which two assessors namely Mr. Liundi and Murusuri presided over the matter. After hearing of the matter it was the opportunity for the assessors to give their opinion as required by the law. But only one assessor namely Mr. Liundi gave his opinion as the other assessor's whereabouts were not known for about two months. Hence it was correct for the trial Tribunal to proceed with the matter under section 23 (3) of the Act.

Submitting on the first ground of appeal, the appellants faulted the trial Tribunal to impose the burden on the appellants to bring a witness who witnessed the sale agreement and at the same time such burden was waived on the respondent's side. The appellants have referred to me on page 6 and 7 of the typed judgment of the trial Tribunal.

The appellants contended further that, the finding of the trial Tribunal on this aspect was not correct because the appellants had intention to call the Magistrate who witnessed the sale agreement but she passed away on 22<sup>nd</sup> August 2020.

On reply, the respondent contended that the appellants had a burden of proof under Section 110 (1) and (2) of the Evidence Act [CAP 6 R.E 2019]

*Alle*

which states clearly that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

To fortify his stance the respondent has referred to me **Sakar's Law of Evidence**, 18<sup>th</sup> Edition, M. C Sarkar. The respondent contended that it was correct for the trial Tribunal to find that the appellants failed to discharge their duty by calling the attesting officer.

On rejoinder the appellants reiterated their submission in chief in respect of the first ground of appeal.

The first ground of appeal needs not detain me longer than it is necessary. The appellants were claimants before the trial Tribunal they therefore had a burden to call not only the attesting officer but all material witnesses to substantiate their claims. The trial Tribunal is not to blame for the failure by the appellants to call witnesses. It is on record (see page 18 of the typed proceedings) that the appellants had intended to call their last witness who was expected to testify on 8/6/2020 but it was not possible because the said witness had been just discharged from the hospital. However the trial Tribunal cannot be blamed and rightly it ought to have

*Adls.*

decided the matter as per the available evidence. It is for that reason the first ground of appeal lacks merits and it is hereby dismissed.

On the second ground of appeal, the appellants faulted the trial Tribunal for basing its judgment on sale agreement by the respondent which was admitted for identification purpose only. According to the appellants, where any document is not admitted as evidence it cannot be used as part of evidence to influence the decision of the court.

To fortify their point, the appellants have cited the decision of **Malmo Montagekosult AB Tanzania Branch v Margaret Gama**, Civil Appeal No. 86 of 2011 Court of Appeal of Tanzania at Dar es Salaam (unreported) in which it was stated that

*"Once sale agreement is excluded as evidence it follows that there is no legal evidence that Charles Jacob Mkomea sold the disputed house to the appellant"*

On reply, the respondent contended that it is not true that the trial Tribunal based its judgment on the respondent's sale agreement which was received for identification purpose. The respondent submitted further that the testimony of DW5 was enough to nullify all the documents tendered by *Alle*.

the appellants as he denied to have sold the disputed house to the appellants rather the respondent.

The respondent submitted further that the authority in **Malmo Montagekosult AB Tanzania Branch v Margaret Gama** [supra] is distinguishable with the case at hand because in the present matter the seller of the house is alive and he testified that he never sold the disputed house to the appellants.

I have keenly perused the record, it not in dispute that the sell agreement between the respondent and DW5 was received for identification purposes only. The same therefore did not form the record and could have not been relied upon. I have also noted that the respondent was given time to comply with the requirement to pay the stamp duty but he expressly stated that he had no money to pay for the same.

Unfortunately the law does not provide for the remedy in such a situation where a part does not have money to pay for the stamp duty as it was the case here. Hence as the document was not properly tendered as

*Alle.*

required by the law, the same could not have been relied upon by the trial Tribunal.

Now the question that needs an answer is whether the trial Tribunal determined the matter on the basis of the document that was received for identification. I have gone through the judgment of the trial Tribunal, I do not agree with the appellants that the matter was determined basing on the document that was received for identification purposes alone rather on appellant's failure to call material witnesses. These witnesses were the seller of the disputed premises as well as the attesting witnesses who witnessed the transaction. It is for that reason the second ground of appeal is allowed to that limited extent of the reliance on document which was received for identification purpose.

On the third ground, the appellants fault the trial Tribunal for basing its decision on the evidence of DW-5 who did not understand the questions put to him due to old age and illness. The evidence of DW-5 was recorded while at his home on bed, he could not know his age and sometimes he asked his family members to assist him to remember some information, the appellants contended. *Atls.*



On reply, the respondent submitted that it is not true that DW-5 was so sick to the extent of not understanding the question put to him. The respondent contended further that DW5 was able to narrate the whole process of selling the house in dispute and he was able to recall how much the sale price, and who gave him the money. The respondent submitted further that if DW5 was unable to understand questions put to him then the trial Tribunal would have said so.

On rejoinder the appellants contended that DW-5 was incapable of testifying and that has been reflected at page 32 of the proceedings.

It is indicated on page 32 of the typed proceedings that DW 5 was sick at the time he testified. I have gone through DW-5's testimony and the appellants' advocate had an opportunity to cross examine that witness. Nothing suggests that the said witness was sick to the extent of not understanding at all the questions put to him as suggested by the appellants.

Neither the appellants nor their advocate raised this issue before the trial Tribunal. I say so because the trial Tribunal was a better place for this matter to be dealt with because the Tribunal had a monopoly of seeing the *Acts*.

witness testifying before it. The fact that DW-5 was sick and his testimony taken at his bed in my settled view, it is not enough to declare him incompetent to testify in absence of proof that his illness prevented him from understanding the matter at hand and answering the questions put to him.

The appellants were supposed to raise this matter before the trial Tribunal and they had a burden to prove that DW-5 was incapable of testifying. Raising it on appeal is an afterthought because this Court is not placed at a better position to determine the state of DW-5. Consequently the third ground of appeal is dismissed for lack of merits.

On the fourth ground, it was contended by the appellants that the trial Tribunal ought to have declared them as lawful owners of the disputed house because they had Certificate of Title over the same. To fortify their point, the appellants have cited the case of **Amina Maulid Ambali & 2 others v Ramadhani Juma**, Civil Appeal No. 35 of 2019 Court of Appeal of Tanzania at Mwanza (unreported) in which it was stated that where two persons have competing interests in a landed property, the person with the certificate thereof will always be taken to be a lawful owner unless it is proved that certificate was not lawfully obtained. *Alle.*

The appellants contended that they obtained and tendered residential licence No. KND 030231 that covers parcel of land No. KND/TND/KTB7/11 which was admitted as exhibit P-1 to prove ownership. The appellants conceded that there was allegation by the respondent that the said licence was illegally obtained but the same was not proved nor the counter claim was filed against the appellants or joining issuing authority (Kinondoni Municipal Council) to prove his allegation.

On reply, the respondent opposed the appellants' submission stating that the appellants claimed to have purchased the disputed house from DW5 who later on denied to have sold the disputed house to the appellants. The case of **Amina Maulid Ambali & 2 others v Ramadhani Juma** [supra], cited by the appellants cannot assist the appellants because the said residential licence emanated from the sale agreement which has been disowned by the seller, hence automatically the said residential licence becomes invalid.

The respondent submitted further that it was not necessary to file a counter claim against the authority which issued the residential license as the same was obtained by fraud. *Adde.*

On rejoinder the appellants essentially reiterated their submission in chief. It was further submitted by the appellants that the residential license cannot be invalid without involvement of the issuing authority.

In determining the fourth ground of appeal I have revisited that written statement of defence for the respondent herein in which he categorically stated that he acquired the disputed house from DW5 on 12/10/2010. He further stated that the appellants cannot claim the ownership of the disputed house and similarly the residential license was illegally obtained.

Hence it is apparently clear that that was allegation of fraud by the respondent in his written statement of defence and the appellants were therefore aware of this allegation. If that is not the end DW5 categorically denied to have sold the disputed house to the appellants. It follows therefore that, in absence of contrary evidence from the appellants it cannot be said the appellants were entitled to be declared as lawfully owners of the disputed house simply because they had a residential licence alone.

Hence the decision of **Amina Maulid Ambali & 2 others v Ramadhani Juma** [supra] cannot assist the appellants. On the allegations

*Alls.*

of not joining the issuing authority of the residential license namely Kinondoni Municipality, the appellants are the one who instituted the matter hence they ought to have joined all necessary persons against whom they sought reliefs. Consequently the fourth ground of appeal fails and it is hereby dismissed.

In upshot and for the foregoing, save for the issue of the document that was received for identification purposes as I have stated before the appeal is hereby dismissed. I will not make an order as to costs.



A handwritten signature in blue ink, appearing to read "Allsafi" or similar, written over a horizontal dotted line.

**A. MSAFIRI,  
JUDGE  
04/8/2022**